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UNITED STATES DISTRICT COURT

Northern District of California

San Francisco Division

PENSION BENEFIT GUARANTY
CORPORATION,

No. C 14-01129 JSW (LB)

Plaintiff,

REPORT AND RECOMMENDATION

[Re: ECF No. 24]

v.

OCEAN LABEL INC.,

Defendant.

INTRODUCTION

In this action, which arises under Title IV of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1301-1461 (“ERISA”), Plaintiff Pension Benefit Guaranty Corporation (“PBGC”) has sued Defendant Ocean Label, Inc. (“Ocean Label”) and seeks a default judgment (1) terminating the Dennis J. Brennan, Inc. Defined Benefit Pension Plan (the “Pension Plan”), (2) appointing PBGC as the Pension Plan’s statutory trustee, (3) establishing August 30, 2014 as the Pension Plan’s termination date; and (4) directing the transfer of any records, assets, or other property of the Pension Plan to PBGC. The district court referred PBGC’s motion for default judgment to the undersigned for a report and recommendation. Upon consideration of PBGC’s unopposed motion and the applicable law, the court **RECOMMENDS** that the district court grant PBGC’s motion and enter the requested judgment against Ocean Label.

1

STATEMENT**I. FACTUAL ALLEGATIONS**

3 The Pension Plan, which is a defined benefit pension plan covered by Title IV of ERISA, was
4 established by Ocean Label on February 1, 1995, for the benefit of Ocean Label's employees.
5 Complaint, ECF No. 1 ¶¶ 13-14¹; *see* 29 U.S.C. §§ 1002(35), 1321(a). The Plan has a total of 13
6 participants. Complaint, ECF No. 1 ¶ 13.

7 No required employer contributions have been made to the Pension Plan since October 2002, and
8 on December 15, 2009 the Pension Plan was closed to any additional benefit accruals by
9 participants. *Id.* ¶¶ 15-16.

10 In September 2012, the United States Department of Labor ("DOL") informed the PBGC of
11 reports it received from Pension Plan participants that participants were not being paid their pension
12 benefits, and that Mr. Brennan was converting Pension Plan assets for his personal use. *Id.* ¶ 17.
13 DOL further informed PBGC that Mr. Brennan appears to have made numerous withdrawals of
14 money from the Pension Plan. *Id.* ¶ 18. This money was neither distributed to Pension Plan
15 participants nor expended on permissible Pension Plan expenses. *Id.* In addition, basic
16 administration of the Pension Plan has been lacking. *Id.* ¶ 19. Plan professionals have resigned
17 because requests for payment for services rendered were ignored, and participant requests to be put
18 into pay status under the Pension Plan have been ignored by the Pension Plan's Administrator. *Id.*

19 On August 20, 2013, PBGC issued its determination ("Determination") that the Pension Plan
20 will be unable to pay benefits when due under 29 U.S.C. § 1342(a)(2) and that the Pension Plan
21 must be terminated under 29 U.S.C. § 1342(c). *Id.* ¶ 20 & Ex. A. PBGC sent a copy of the
22 Determination to Ocean Label via Federal Express on August 29, 2013, and offered to enter into an
23 agreement consensually terminating the Pension Plan and naming PBGC statutory trustee thereof.
24 *Id.* ¶ 21. As of March 11, 2014, PBGC received no response from Ocean Label. *Id.*

25 On August 30, 2013, PBGC published notice of its Determination in the Tri-Valley Times
26 newspaper, which covers the area in which the Pension Plan was administered and benefits under
27

28 ¹ Citations are to the Electronic Case File ("ECF") with pin cites to the ECF-generated page
numbers at the top of the document.

1 the Pension Plan were earned (Pleasanton, California). *Id.* ¶ 22. This notice informed participants
2 that PBGC was proceeding to terminate the Pension Plan in accordance with ERISA. *Id.*

3 **II. PROCEDURAL HISTORY**

4 PBGC filed its complaint on March 11, 2014. *See generally id.* It requested that the court: (1)
5 terminate the Pension Plan, (2) appoint PBGC as the Pension Plan's statutory trustee, (3) establish
6 August 30, 2013 as the Pension Plan's termination date; and (4) direct Ocean Label and all other
7 persons or entities having possession, custody, or control of any records, assets, or other property of
8 the Pension Plan, or any documents required to determine Pension Plan benefits, to transfer, convey,
9 and deliver all such items to PBGC. *Id.* at 7-8. PBGC served the complaint on Ocean Label's
10 registered agent on March 24, 2014. Executed Summons, ECF No. 13. The registered agent then
11 wrote to PBGC confirming receipt of the complaint and advising it that Ocean Label's corporate
12 status was "suspended," which meant, among other things, that Ocean Label could not appear as a
13 defendant in this action. *See* Rayle Affidavit, Ex. A, ECF No. 14-2. To date, Ocean Label has not
14 appeared in this action or otherwise communicated with PBGC. On PBGC's motion, the district
15 court thereafter granted PBGC permission to make alternate service of the complaint on the
16 California Secretary of State. 8/12/2014 Order, ECF No. 20. PBGC served the California Secretary
17 of State with the complaint on August 14, 2014. Proof of Service, ECF No. 21. After Ocean Label
18 failed to respond to the complaint, and upon PBGC's request, the Clerk of the Court entered Ocean
19 Label's default. Entry of Default, ECF No. 23.

20 On October 7, 2014, PBGC filed the pending motion for default judgment. Motion, ECF No. 24.
21 The next day, the district court referred it to the undersigned for a report and recommendation.
22 Order of Referral, ECF No. 25. Ocean Label did not file an opposition to the motion, nor did it
23 appear at the November 20, 2014 hearing. 11/20/2014 Minute Order, ECF No. 28.

24 **ANALYSIS**

25 **I. THE COURT HAS JURISDICTION OVER THIS MATTER AND DEFENDANT**

26 Before entering default judgment, a court must determine whether it has jurisdiction over Ocean
27 Label. *See In re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999).

A. Subject-Matter Jurisdiction

District courts have original jurisdiction to hear civil cases arising under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331. In this action, PBGC seeks, under 29 U.S.C. §§ 1342 and 1370, to terminate the Pension Plan, have itself appointed as statutory trustee, establish a termination date for the Pension Plan, and require the transfer Pension Plan-related assets and documents to it. *See* Complaint, ECF No. 1 ¶ 2. Thus, the court has subject-matter jurisdiction over this action.

B. Personal Jurisdiction

As the party seeking to invoke this court's jurisdiction, PBGC bears the burden of establishing that this court has personal jurisdiction over Ocean Label. *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986) (citing *Data Disc, Inc. v. Sys. Tech Assocs.*, 557 F.2d 1280, 1285 (9th Cir. 1977)). Here, the court may exercise personal jurisdiction over Ocean Label because the Pension Plan was administered, and benefits under the Pension Plan were earned, in this District. *See* Complaint, ECF No. 1 ¶ 22; *see* 29 U.S.C. § 1370(c).

II. THE EITEL FACTORS AND ENTRY OF DEFAULT JUDGMENT

Under Federal Rule of Civil Procedure 55(b)(2), a plaintiff may apply to the district court for – and the court may grant – a default judgment against a defendant who has failed to plead or otherwise defend an action. *See Draper v. Coombs*, 792 F.2d 915, 925 (9th Cir. 1986). Default judgments are generally disfavored because “cases should be decided on the merits whenever reasonably possible.” *Eitel v. McCool*, 782 F.2d 1470, 1472 (9th Cir. 1986). The court must consider the following factors when deciding whether to use its discretion to grant a motion for default judgment: (1) the possibility of prejudice to the plaintiff; (2) the merits of the plaintiff’s substantive claims; (3) the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute about the material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits. *Id.* at 1471-72.

A. Merits and Sufficiency (the Second and Third Factors of the *Eitel* Test)

After entry of default, well-pleaded allegations in the complaint regarding liability and entry of

1 default are taken as true, except as to damages. *See Fair Housing of Marin v. Combs*, 285 F.3d 899,
2 906 (9th Cir. 2002). The court is not required to make detailed findings of fact. *Id.* Default
3 judgment cannot exceed the amount demanded in the pleadings. Fed. R. Civ. P. 54(c).

4 The Supreme Court has explained what PBGC is and what it may do:

5 . . . PBGC is a wholly owned United States Government corporation, *see* 29 U.S.C. § 1302, modeled after the Federal Deposit Insurance Corporation. *See* 120 Cong. Rec. 6 29950 (1974) (statement of Sen. Bentsen). The Board of Directors of the PBGC 7 consists of the Secretaries of the Treasury, Labor, and Commerce. 29 U.S.C. § 8 1302(d). The PBGC administers and enforces Title IV of ERISA. Title IV includes a 9 mandatory Government insurance program that protects the pension benefits of over 10 30 million private-sector American workers who participate in plans covered by the 11 Title. In enacting Title IV, Congress sought to ensure that employees and their beneficiaries would not be completely “deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans.” *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, 467 U.S. 717, 720, 104 S. Ct. 2709, 2713, 81 L. Ed. 2d 601 (1984). *See also Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361-362, 374-375, 100 S. Ct. 1723, 1726, 1732-33, 64 L. Ed.2d 354 (1980).

When a plan covered under Title IV terminates with insufficient assets to satisfy its pension obligations to the employees, the PBGC becomes trustee of the plan, taking over the plan's assets and liabilities. The PBGC then uses the plan's assets to cover what it can of the benefit obligations. *See* 29 U.S.C. § 1344 (1982 ed. and Supp. IV). The PBGC then must add its own funds to ensure payment of most of the remaining "nonforfeitable" benefits, i.e., those benefits to which participants have earned entitlement under the plan terms as of the date of termination. §§ 1301(a)(8), 1322(a) and (b). ERISA does place limits on the benefits PBGC may guarantee upon plan termination, however, even if an employee is entitled to greater benefits under the terms of the plan. *See* 29 CFR § 2621.3(a)(2) and App. A (1989); 29 U.S.C. § 1322(b)(3)(B). In addition, benefit increases resulting from plan amendments adopted within five years of the termination are not paid in full. Finally, active plan participants (current employees) cease to earn additional benefits under the plan upon its termination and lose entitlement to most benefits not yet fully earned as of the date of plan termination. 29 U.S.C. §§ 1322(a) and (b), 1301(a)(8); 29 CFR § 2613.6 (1989).

21 The cost of the PBGC insurance is borne primarily by employers that maintain
22 ongoing pension plans. Sections 4006 and 4007 of ERISA require these employers to
23 pay annual premiums. *See* 29 U.S.C. §§ 1306 and 1307 (1982 ed. and Supp. IV).
24 The insurance program is also financed by statutory liability imposed on employers
25 who terminate under-funded pension plans. Upon termination, the employer becomes
liable to the PBGC for the benefits that the PBGC will pay out. Because the PBGC
historically has recovered only a small portion of that liability, Congress repeatedly
has been forced to increase the annual premiums. Even with these increases, the
PBGC in its most recent annual report noted liabilities of \$4 billion and assets of only
\$2.4 billion, leaving a deficit of over \$1.5 billion.

As noted above, plan termination is the insurable event under Title IV. Plans may be terminated “voluntarily” by an employer or “involuntarily” by the PBGC. An employer may terminate a plan voluntarily in one of two ways. It may proceed with a “standard termination” only if it has sufficient assets to pay all benefit commitments. A standard termination thus does not implicate PBGC insurance responsibilities. If

1 an employer wishes to terminate a plan whose assets are insufficient to pay all
 2 benefits, the employer must demonstrate that it is in financial “distress” as defined in
 3 29 U.S.C. § 1341(c) (1982 ed., Supp. IV). Neither a standard nor a distress
 4 termination by the employer, however, is permitted if termination would violate the
 5 terms of an existing collective-bargaining agreement. 29 U.S.C. § 1341(a)(3).

6 The PBGC, though, may terminate a plan “involuntarily,” notwithstanding the
 7 existence of a collective-bargaining agreement. *Ibid.* Section 4042 of ERISA
 8 provides that the PBGC may terminate a plan whenever it determines that:

9 “(1) the plan has not met the minimum funding standard required
 10 under section 412 of title 26, or has been notified by the Secretary of
 11 the Treasury that a notice of deficiency under section 6212 of title 26
 12 has been mailed with respect to the tax imposed under section 4971(a)
 13 of title 26,

14 “(2) the plan will be unable to pay benefits when due,

15 “(3) the reportable event described in section 1343([c])(7) of this title
 16 has occurred, or

17 “(4) the possible long-run loss of the [PBG] with respect to the plan
 18 may reasonably be expected to increase unreasonably if the plan is not
 19 terminated.”

20 29 U.S.C. § 1342(a).

21 Termination can be undone by PBGC. Section 4047 of ERISA, 29 U.S.C. § 1347,
 22 provides:

23 “In the case of a plan which has been terminated under section 1341
 24 or 1342 of this title the [PBG] is authorized in any such case in
 25 which [it] determines such action to be appropriate and consistent with
 26 its duties under this subchapter, to take such action as may be
 27 necessary to restore the plan to its pretermination status, including, but
 28 not limited to, the transfer to the employer or a plan administrator of
 control of part or all of the remaining assets and liabilities of the plan.”

29 When a plan is restored, full benefits are reinstated, and the employer, rather than the
 30 PBGC, again is responsible for the plan’s unfunded liabilities.

31 *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 636-40 (1990) (footnotes omitted).

32 Here, PBGC issued its Determination that the Pension Plan will be unable to pay benefits when
 33 due and that the Pension Plan must be terminated. Complaint, ECF No. 1 ¶¶ 8, 20 & Ex. A. It thus
 34 seeks to involuntarily terminate the Pension Plan under 29 U.S.C. § 1342(a)(2) and (c). The court
 35 may establish a termination date of the Pension Plan under 29 U.S.C. § 1348(a)(4) because PBGC
 36 and the Pension Plan did not agree on one. PBGC also seeks to be appointed as statutory trustee of
 37 the Pension Plan, as it may do under 29 U.S.C. § 1342(b)(1). In light of PBGC’s allegations and the

1 applicable law, the court finds that PBGC has sufficiently alleged its claims and that those claims
2 have merit.

3 **B. The Remaining *Eitel* Factors**

4 The remaining *Eitel* factors weigh in favor of default judgment.

5 **1. The Possibility of Prejudice to PBGC**

6 If the motion is not granted, PBGC has no recourse. As explained above, under 29 U.S.C. §
7 1342(c), a pension plan can be terminated only by consent of the pension plan's administrator or by
8 decree of a district court. In this case, Ocean Label's default makes it impossible to terminate the
9 Pension Plan consensually, leaving a court order as the only option. And without terminating the
10 Pension Plan, PBGC will be unable to pay Pension Plan benefits under the ERISA insurance
11 program.

12 **2. The Possibility of a Dispute concerning a Material Fact**

13 As Ocean Label has not appeared and PBGC's factual allegations are taken as true, there are no
14 disputed issues of material fact.

15 **3. Excusable Neglect**

16 Nothing in the record suggests excusable neglect. To the contrary, Ocean Label's registered
17 agent confirming receipt of the complaint and acknowledged that it could not appear as a defendant
18 in this action because it is a "suspended" corporation.

19 **4. The Sum of Money at Stake in the Action**

20 PBGC does not seek money damages in this action.

21 **5. The Strong Policy in the Federal Rules that Favors Decisions on the Merits**

22 When determining whether to grant a default judgment, the court must consider the strong policy
23 of the federal courts in favoring decisions on the merits. This policy, however, is not dispositive;
24 rather, the court still has great latitude in exercising its discretion with regards to the relative weight
25 of the remaining *Eitel* factors. *See Pepsico, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1177
26 (C.D. Cal. 2002). Despite the policy of favoring decisions on the merits, default judgment is
27 appropriate when a defendant refuses to litigate a case. Fed. R. Civ. P. 55(b); *see Bd. of Trs. v. RBS*
28 *Washington Blvd. LLC*, No. C 09-06660 WHA, 2010 WL 145097, at *4 (N.D. Cal. Jan. 8, 2010).

1 That is what has occurred here.

2 **III. THE RELIEF SOUGHT**

3 PBGC seeks a default judgment (1) terminating the Pension Plan, (2) appointing PBGC as the
4 Pension Plan's statutory trustee, (3) establishing August 30, 2013 as the Pension Plan's termination
5 date; and (4) directing all persons having possession, custody, or control of any records, assets, or
6 other property of the Pension Plan to transfer such items to PBGC. Proposed Order, ECF No. 24-3.

7 As explained above, PBGC has sufficiently alleged that it may seek to have the Pension Plan
8 terminated under 29 U.S.C. § 1342(a)(2) and (c). It also may seek to have itself appointed as
9 statutory trustee under 29 U.S.C. § 1342(b)(1).

10 As for the termination date, because PBGC and the Pension Plan did not agree on one, the court
11 may establish it under 29 U.S.C. § 1348(a)(4). PBGC asserts that August 30, 2013 is an appropriate
12 date because its August 20, 2013 Determination told Ocean Label that it would seek to have the
13 Pension Plan terminated as of that date. It also published notice of its Determination in the
14 Tri-Valley Times newspaper on August 30, 2013. The court agrees with PBGC and finds August
15 30, 2013 an appropriate date for these reasons.

16 As for the transfer of all Pension Plan-related information and documents, 29 U.S.C. §
17 1342(d)(1)(A)(ii) provides that a statutory trustee has the power "to require the transfer of all (or any
18 part) of the assets and records of the plan to himself as trustee." Thus, the court finds that PBGC's
19 request for a judgment to direct all persons having possession, custody, or control of any records,
20 assets, or other property of the Pension Plan to transfer such items to PBGC, is appropriate. *See*
21 *Pension Benefits Guar. Corp. v. Natasi White, Inc.*, 476 F. Supp. 2d 228, 230 (E.D.N.Y. 2007)
22 (approving such relief); *Pension Benefit Guar. Corp. v. Allen Tool Corp.*, No. 99-CV-2050, 2000
23 WL 687898, at *1 (N.D.N.Y. 2000).

24 **CONCLUSION**

25 Based on the foregoing, the court **RECOMMENDS** that the district court grant PBGC's motion
26 and enter a default judgment against Ocean Label that (1) terminates the Pension Plan, (2) appoints
27 PBGC as the Pension Plan's statutory trustee, (3) establishes August 30, 2014 as the Pension Plan's
28 termination date; and (4) directing the transfer of any records, assets, or other property of the

1 Pension Plan to PBGC.

2 The court **DIRECTS** PBGC to serve a copy of this Report and Recommendation on Ocean
3 Label's registered agent and on the California Secretary of State.

4 Any party may file objections to this Report and Recommendation with the district judge within
5 fourteen days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); N.D.
6 Cal. Civ. L.R. 72. Failure to file an objection may waive the right to review the issue in the district
7 court.

8 **IT IS SO ORDERED.**

9 Dated: November 20, 2014



10 LAUREL BEELER
11 United States Magistrate Judge

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